FILE COPY

FILED
OCT 7 1947

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. 391

THE STATE OF OHIO
on the Relation of
WILLIAM A. WILLIAMS,
Petitioner,

vs.

C. EMORY GLANDER,
Tax Commissioner of the State of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio, and
BRIEF IN SUPPORT OF PETITION.

MEYER A. COOK,
605 Guardian Building,
Cleveland 14, Ohio,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 9427

INDEX.

PETITION FOR WRIT OF CERTIORARI (To the Supreme Court of Ohio) 1

I. Statement of the Matter Involved 1

II. Reasons Relied on for Allowance of the Writ ... 3

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 5

I. Opinion of Court Below 5

II. Jurisdiction 5

III. Statement of the Case 7

IV. Specification of Errors 7

V. Argument 9

Conclusion 11

AUTHORITIES CITED.

Cases.

Charleston Federal Savings and Loan Ass'n vs. Alderson, 324 U. S. 182, 65 Sup. Ct. 624 ..... 3, 10

Cumberland Coal Co. vs. Board of Revision, 284 U. S. 23, 52 Sup. Ct. 48 ..... 3, 10

Hillsborough Township vs. Cromwell, 326 U. S. 620, 66 Sup. Ct. 445 ..... 3, 11

Ohio v. Helvering, Comm., 292 U. S. 360, 78 L. Ed., 1307, 54 S. Ct. 725 6

Sioux City Bridge Co. vs. Dakota County, 260 U. S. 441, 43 Sup. Ct. 190 ..... 3, 10

State ex rel. Williams v. Glander, Tax Comm., 74 N. E. (2d) 82, 148 O. S. 188, 35 O. O. 192 9

Sunday Lake Iron Co. vs. Wakefield Township, 247 U. S. 350, 38 Sup. Ct. 495 ..... 3, 10

Statutes.

General Code of Ohio:
Section 5320 (Part 2nd, Civil, Title I, Taxation).. 7
Section 5328 ..... 1, 6
Section 5366 ..... 6, 8
U. S. C. Title 28, Section 344(b)..... 5, 7

Constitutions.

Ohio Constitution:
Article I, Section 2..... 2, 6
U. S. Constitution:
Fourteenth Amendment 2, 3, 5, 6, 7, 8, 9, 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. . . . . .

THE STATE OF OHIO
on the Relation of
WILLIAM A. WILLIAMS,
Petitioner,

vs.

C. EMORY GLANDER,
Tax Commissioner of the State of Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

To the Honorable, the Supreme Court of the United States:

This petition of the State of Ohio on the Relation of William A. Williams respectfully shows:

I.

STATEMENT OF THE MATTER INVOLVED.

Petitioner is a taxpayer of the State of Ohio and as such filed a petition in mandamus against the respondent in the Court of Appeals of Franklin County, Ohio, on the 18th day of March, 1946 (T. 6), wherein, in behalf of himself and all other taxpayers of the State of Ohio similarly situated, he sought to require the respondent, in his official capacity, to levy and assess personal property taxes against the Department of Liquor Control in pursuance of the provisions of Section 5328 of the General Code of Ohio, which provides among other things, insofar as it relates to the subject of the litigation, as follows:

"All personal property located and used in business in this state and all domestic animals kept in this state, whether used in business or not shall be subject to taxation, regardless of the residence of the owners thereof."

The respondent thereafter filed a demurrer (T. 6) to said petition which demurrer was sustained by the said Court of Appeals on June 28, 1946. (T. 6.) Thereafter, on July 31, 1946, petitioner filed an amended petition (T. 4 and 6) wherein the identical relief, as set forth above, was sought, to which the respondent again demurred. (T. 6.) The demurrer to the amended petition was sustained by said Court of Appeals on September 17, 1946. (T. 6.)

The petitioner, in the manner and form authorized by the Constitution of Ohio and by the Statutes of Ohio, filed an appeal as a matter of right to the Supreme Court of Ohio. (T. 6.)

Among the errors complained of to the Supreme Court of Ohio was that the decision of the Court of Appeals of Franklin County, Ohio, in sustaining said demurrer to petitioner's amended petition, was a violation of the "equal protection of the laws" clause of the Fourteenth Amendment to the Constitution of the United States, and of the "equal protection" clause of Section 2, Article I of the Constitution of Ohio, because the decision classified taxpayers differently with respect to the same type of personal property. (T. 3.)

The said Supreme Court of Ohio sustained the decision of the Court of Appeals of Franklin County by a majority of 4 to 3. (T. 2, 21.)

II.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The said Supreme Court of Ohio, in said case, decided the federal question of substance as to the "equal protection of the laws" clause and the "due process of laws" clause of the Fourteenth Amendment in favor of respondent herein, by holding that failure of the Tax Commissioner of the state of Ohio to levy and assess a personal property tax upon the personal property owned and used in business in the state of Ohio by the Department of Liquor Control of said state was not a discriminatory action as to individual taxpayers of said state within the purview of the Fourteenth Amendment to the Constitution of the United States. (T. 16 and 17.) Said decision is not in accord with the decisions of this Court, including the cases of *Sunday Lake Iron Co. vs. Wakefield Township,* 247 U. S. 350, 38 Sup. Ct. 495; *Sioux City Bridge Co. vs. Dakota County,* 260 U. S. 441, 43 Sup. Ct. 190; *Cumberland Coal Co. vs. Board of Revision,* 284 U. S. 23, 52 Sup. Ct. 48; *Charleston Federal Savings and Loan Ass'n vs. Alderson,* 324 U. S. 182, 65 Sup. Ct. 624; and *Hillsborough Township vs. Cromwell,* 326 U. S. 620, 66 Sup. Ct. 445.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of Ohio, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Ohio had in the case numbered and entitled on its docket, No. 30879, decided June 25, 1947, viewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Supreme Court of Ohio may be reversed by the court, and for such further relief as to this Court may seem proper.

Dated October 6, 1947.

MEYER A. COOK,
605 Guardian Building,
Cleveland 14, Ohio,
Cherry 2434,
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

THE STATE OF OHIO
on the Relation of
WILLIAM A. WILLIAMS,
Petitioner,

vs.

C. EMORY GLANDER,
Tax Commissioner of the State of Ohio,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF COURT BELOW.

The opinion in the Supreme Court of Ohio is reported in 74 N. E. (2d), 82, 148 O. S. 188, 35 O. O. 192. (T. 7 to 33 inc.)

II.

JURISDICTION.

1. The date of the judgment to be reviewed is June 25, 1947.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is U. S. C. Title 28, Section 344 (b).

3. The violation of the "equal protection of the laws" clause of the Fourteenth Amendment to the Constitution of the United States was brought in issue in the assignment of errors filed in connection with the appeal from the Court of Appeals of Franklin County to the Supreme

Court of Ohio as a matter of right, the action having originated in the Court of Appeals of Franklin County. (T. 3.)

The petitioner, in the manner and form authorized by the Constitution of Ohio and by the Statutes of Ohio, filed an appeal as a matter of right to the Supreme Court of Ohio. (T. 6.)

Among the errors complained of to the Supreme Court of Ohio was that the decision of the Court of Appeals of Franklin County in sustaining the demurrer to petitioner's petition, was a violation of the "equal protection of the laws" clause of the Fourteenth Amendment to the Constitution of the United States, and of the "equal protection" clause of Section 2, Article I of the Constitution of Ohio, because the decision classified taxpayers differently with respect to the same type of personal property. (T. 3.)

It is the petitioner's contention that the nature of the case is such that it is brought squarely under the "equal protection" clause of the Fourteenth Amendment for the following reasons. The Department of Liquor Control is not an administrative department of the state of Ohio, but a separate entity carrying on business within the state with authority to acquire and transfer title to personal property and whose obligations are not charges against the state of Ohio. The Supreme Court of the United States in the case of *Ohio v. Helvering, Comm.*, 292 U. S. 360, 78 L. Ed., 1307, 54 S. Ct. 725, held that the state of Ohio operating through the Department of Liquor Control was a "person" within the purview of federal taxation when engaged in a private business, since conduct of a private business is a non-governmental function.

The General Code of Ohio (Section 5328) provides that:

> "* * * All personal property located and used in business in this state * * * shall be subject to taxation"

and further provides that (Section 5366):

> "* * * 'Taxpayer' means *any owner of taxable property* and includes first, every person residing in, or in-

> corporated or organized by or under the laws of this state, * * * excepting, in each instance, those hereinafter expressly excluded. * * * 'Taxpayer' excludes all individuals, partnerships, corporations, associations, and joint stock companies * * * in this title defined as financial institutions, as dealers in intangibles, as domestic insurance companies and as public utilities, respectively * * *." (Emphasis ours.)

Therefore, it is the petitioner's view that he has been denied "equal protection of the laws" and "due process of the law" as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, and that the nature of the case is such that it is within the jurisdictional provision of U. S. C. Title 28, Section 344 (b).

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition under I (pp. 1-2), which is hereby adopted and made part of this brief.

IV.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Ohio erred in holding that the action in mandamus against the respondent as Tax Commissioner of the State of Ohio was an action against the state of Ohio and as such could not be maintained in the absence of enabling legislation. (T. 13.)

2. The Supreme Court of Ohio erred in holding that "neither the word 'person,' 'taxpayer,' nor 'corporation' use in part 2nd, Civil, Title I, Taxation, Sec. 5320 *et seq.*, Ohio Gen. Code, was meant to include state of Ohio." (T. 14, 19.)

3. The Supreme Court of Ohio erred in failing to recognize the state of Ohio in its operation of the Department of Liquor Control as coming within the purview of Section

5366 of the General Code of Ohio, which reads in part as follows:

> "* * * 'Taxpayer' means *any owner of taxable property* and includes first, every person residing in, or incorporated or organized by or under the laws of this state, * * * excepting, in each instance, those hereinafter expressly excluded * * * 'Taxpayer' excludes all individuals, partnerships, corporations, associations, and joint stock companies * * * in this title defined as financial institutions, as dealers in tangibles, as domestic insurance companies and as public utilities, respectively * * *." (Emphasis ours.)

4. The Supreme Court of Ohio erred in failing to hold that the state of Ohio was subject to taxation insofar as the personal property used in business by the Department of Liquor Control was concerned.

5. The Supreme Court of Ohio erred in holding that the classification of *taxpayers* was not in violation of the "equal protection of the laws" clause of the Fourteenth Amendment to the Constitution of the United States. (T. 16 and 17.)

6. The Supreme Court of Ohio erred in holding that the Department of Liquor Control of the state of Ohio was an administrative department of the state and not a separate entity carrying on a business within the state with statutory authority to acquire and transfer title to personal property and whose obligations are charges against the department and not against the state. (T. 10 and 11.)

7. The Supreme Court of Ohio erred in holding that the Department of Liquor Control of the state of Ohio was carrying on solely a "governmental function." (T. 20.)

8. The Supreme Court of Ohio erred in holding that the petitioner was not denied "due process of law" under the Fourteenth Amendment to the Constitution of the United States. (T. 16 and 17.)

V.

ARGUMENT.

The failure of the Tax Commissioner of Ohio, respondent herein, to levy and assess the personal property tax on the personal property owned by the Department of Liquor Control results in discrimination against the petitioner herein and, as to him and all other owners of personal property *used in business* in the state of Ohio, denies "equal protection of the laws" and "due process of law" as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The petitioner's position in this respect is stated very clearly by Judge Hart in the dissenting opinion of the instant case, *State ex rel. Williams v. Glander, Tax Comm.*, 74 N. E. (2d) 82, 148 O. S. 188, 35 O. O. 192, which reads in part as follows:

> "Unless all 'taxpayers' or 'persons' are classified alike with respect to the taxation of a given type of property, there is a violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution and the equality protection clause of Section 2, Article I of the Ohio Constitution. The personal property used in business by the Department of Liquor Control in the operation of state liquor stores must be taxed in the same manner as that of any other 'taxpayer' or 'person' to meet constitutional requirements, because there can be no classification of taxpayers with respect to the same type of personal property although there may be a classification of types of personal property subject to taxation. This principle is supported by the cases of *State, ex rel. Struble v. Davis et al., Tax Comm.*, 132 Ohio St., 555, 8 O. O., 552, 9 N. E. (2d), 684, and *State, ex rel. Hostetter v. Hunt et al., Exrs.*, 132 Ohio St., 568, 8 O. S. 558, 9 N. E. (2d) 676. Courts should construe Sections 5320 and 5366, General Code, so as to permit their constitutional operation. There can be no constitutional justification for taxing the property of a permittee of the Department of Liquor Control, who purchases his stock of liquor from the

department, and at the same time relieve from taxation the property of the liquor store operated, perhaps next door, by the department engaged in identical private business." (T. 25 and 26.)

The Supreme Court of the United States, in a long line of decisions, has jealously guarded the rights of the individual taxpayer against arbitrary and discriminatory action by a state or its subdivisions in regard to the levy and assessment of taxes. The court, in *Sunday Lake Iron Co. v. Wakefield Township,* 247 U. S. 350, 36 Sup. Ct. 495, took the position that:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

This holding was reiterated some five years later in the case of *Sioux City Bridge Co. v. Dakota County,* 260 U. S. 441, 43 Sup. Ct. 190, 191, in which the court, in approval, quoted directly from the opinion in *Sunday Lake Iron Co. v. Wakefield Township, supra.*

In the case of *Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pa.,* 284 U. S. 23, 52 Sup. Ct. 48, the court maintained this identical position after first deciding that a writ of certiorari would lie to the Supreme Court of the United States where the state court had entertained and decided the federal question of contravention of the Fourteenth Amendment.

Again in the case of *Charleston Federal Savings and Loan Ass'n v. Alderson,* 324 U. S. 182, 65 Sup. Ct. 624, the court held that an attack in a state court on the validity of state assessments under the "equal protection

clause" of the Fourteenth Amendment would support a petition for certiorari to the United States Supreme Court.

In a most recent case, *Hillsborough Township v. Cromwell*, 326 U. S. 620, 66 Sup. Ct. 445, a petition for writ of certiorari was granted under circumstances involving principles of law similar to the instant case. The court went on to hold that:

> "* * * The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment * * *."

The majority of the court also entertained and decided the question of whether or not the failure of the Tax Commissioner, respondent herein, to levy and assess a tax on the personal property of the Department of Liquor Control was or was not in contravention of the Fourteenth Amendment to the Constitution of the United States. Said majority held that it was not, disposing of the issue in syllabus (T. 8 and 9) as follows:

> "The failure of the state to levy, assess and collect personal property taxes under Section 5320 *et seq.*, General Code, while collecting the tax or charge made under Section 6064-10, General Code, is not a denial of due process or of equal protection of the law to any citizen or person."

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

MEYER A. COOK,
Counsel for Petitioner.